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83 No. 1435

In The

Supreme Court of the United States

October Term, 1983

CARLO MARAMONTE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the United States Constitution prohibit a court from resentencing a defendant to a more severe sentence based on a State Supreme Court decision rendered subsequent to the original sentence and which decision expanded the scope of a mandatory sentencing statute?

2. Once a defendant has complied with a portion of a sentence, does the Double Jeopardy Clause of the United States Constitution prohibit a court from resentencing a defendant to a more severe sentence?

3. Is the resentencing of a defendant to a more severe sentence based on a retroactive application of a judicial interpretation of a statute a denial of due process of law?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ:	
I. The resentencing of the defendant to a more severe sentence because the State Supreme Court in a decision subsequent to the original sentencing had expanded the scope of a mandatory sentencing statute violated the Double Jeopardy Clause of the United States Constitution	5
II. Once a defendant has complied with a portion of his sentence the Double Jeopardy Clause of the United States Constitution prohibits him from being sentenced to a more severe sentence	8
III. The resentencing of a defendant to a more severe sentence based on a retroactive application of the law deprived the defendant of due process of law	9

Contents

Page

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Bouie v. Columbia, 378 U.S. 347 (1964) 9, 10

Bozza v. United States, 330 U.S. 160 (1974) 7

Calder v. Bull, 3 Dall. 386 (1798) 10

Ex Parte Lange, 85 U.S. 163 (1874) 6

Fletcher v. Peck, 6 Cranch 87 (1810)..... 10

Green v. United States, 355 U.S. 184 (1957) 5

In re Bradley, 318 U.S. 50 (1943) 6, 8, 9

Lindsey v. State of Washington, 301 U.S. 397 (1937) 10

Marks v. United States, 430 U.S. 188 (1977) 9, 10

North Carolina v. Pearce, 395 U.S. 711 (1969) 6

State v. Des Marets, 92 N.J. 62, 455 A. 2d 1074 (1983) 5, 6, 7, 10

State v. Stewart, 186 N.J. Super. 517, 453 A. 2d 246 (App. Div. 1982, cert. granted, 93 N.J. 271, 460 A. 2d 674 (1983) 5, 6, 7,

Contents

Page

United States v. Benz, 282 U.S. 304 (1931) 7

United States v. DiFrancesco, 449 U.S. 117 (1980) 8

United States v. Hawthorne, 532 F. 2d 318 (3rd Cir. 1976) 10

United States v. Wasserman, 504 F. 2d 1012 (5th Cir. 1974) 9

United States v. Wilson, 420 U.S. 332 (1975) 6

Weaver v. Graham, 450 U.S. 24 (1981) 10

Statutes Cited:

28 U.S.C. §1257(3) 2

N.J.S.A. 2C:43-6c 6, 7

N.J.S.A. 2C:44-1f(2) 8

United States Constitution Cited:

Fifth Amendment ..... i, 2, 4, 5, 8, 9, 10

Article 1, Section 10 9

Rules Cited:

N.J. R. 1:6-3 8

N.J. DR. 7-110(B)(3) 9

Contents

Page

APPENDIX

Order of the Supreme Court of New Jersey Denying Petition 1a

Opinion of the Superior Court of New Jersey, Appellate Division 2a

Opinion of the Superior Court of New Jersey, Law Division 6a

No.

In The

Supreme Court of the United States

October Term, 1983

CARLO MARAMONTE,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

The petitioner Carlo Maramonte, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey denying petitioner's petition for certification entered in the proceeding on January 17, 1984.

OPINION BELOW

The opinion of the Law Division and Appellate Division of the State of New Jersey appears in the appendix hereto. No opinion was rendered by the Supreme Court of New Jersey.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 17, 1984. This petition for certiorari was filed

within sixty days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

On October 1, 1982 defendant Carlo Maramonte together with co-defendants Onnifredo Ventricelli and Vincent DeLeo were indicted and charged with the offenses of burglary, theft, possession of a firearm, possession of a knife for unlawful purposes, possession of the knife and resisting arrest. On December 20, 1982 Carlo Maramonte entered pleas of guilty to the charges of burglary in the second degree, possession of a firearm and resisting arrest. The state agreed to recommend the dismissal of the remaining four counts of the indictment as well as a seven year sentence with a three year parole disqualifier. The state also agreed to recommend that the sentences on all charges would be concurrent. The two co-defendants also entered pleas of guilty to various counts of the indictment.

At the time of his plea of guilty, Carlo Maramonte stated that he and his two co-defendants walked inside the Conrail yard in Elizabeth on July 11, 1982. It was at night. They had entered the Conrail Yard with a purpose of taking something out of trailers. These were closed, sealed truck trailers. This particular box car contained sneakers. The defendants were going to see what was in the car and take what they found. Carlo Maramonte heard a shot and he ran. At the time, Carlo Maramonte had a gun in his back pocket for which he did not have a permit. He threw the gun over the fence and hid under a trailer. When the Conrail police attempted to arrest him from under the trailer, he was scared and resisted coming out. At the time of the plea, it was stipulated that the gun was not used during the course of the commission of the offense. Based on this factual statement, the court accepted the defendant Carlo Maramonte's plea of guilty to the charges of burglary in the second degree, unlawful possession of a weapon and resisting arrest. Prior to accepting the plea, the defendant was advised by the court that the maximum penalties for the offenses was sixteen and one half years and a fine of $115,000. In addition, the defendant was told that the State would recommend the dismissal of the remaining charges in the indictment and would recommend that the aggregate sentence of the court be seven years with a three year parole disqualifier. It was also to be recommended that all sentences run concurrent with each other. It was the position of the defendants, however, that a mandatory jail sentence was not necessary.

On January 21, 1983 the three defendants were sentenced. Non-custodial sentences were imposed on them. Carlo Maramonte was sentenced to three years probation and a fine of one thousand dollars on the burglary charge; probation and a fine of one thousand dollars on the weapons charge; a fine of two hundred dollars on the resisting arrest charge. The probationary terms were concurrent. In addition, a penalty of twenty five dollars was imposed on each of the three charges.

On January 21, 1983, immediately after sentence was imposed, the State moved to stay the execution of the three sentences. This motion was granted. On January 31, 1983, on the prosecutor's ex parte application, the court signed an order extending the stay for an additional ten days.

On February 1, 1983 the prosecutor filed a motion in the Superior Court Law Division for an order correcting illegal sentences imposed on Carlo Maramonte, Onnifredo Ventricelli and Vincent DeLeo. On February 9, 1983 the Prosecutor filed a notice of appeal in the Appellate Division as to Carlo Maramonte. Notice of appeals were also filed by the Prosecutor as to the co-defendants.

On February 10, 1983 the Superior Court Law Division resentenced the defendant Carlo Maramonte to a three year prison term with a three year parole disqualifier on the burglary charge. On the possession of weapons charge a three year prison term was also imposed. On the resisting arrest charge a sentence of nine months was imposed. All the sentences were to run concurrently with each other. As to the co-defendants, on February 10, 1983 the State changed its position and did not request the court to impose a custodial sentence on them. The State also withdrew the three appeals it had filed with regard to the defendants. Prior to being resentenced, Carlo Maramonte objected that the resentencing to a term of imprisonment would be a violation of the Double Jeopardy Clause of the United States Constitution. Both the sentencing and appellate court rejected this argument on the grounds that the constitutional provision did not apply since the original sentence was illegal. In addition, the appellate court held that due process was not violated because the Supreme Court had defined the scope of the statute rather than expanded its scope.

The trial court, in resentencing the defendant, said it was bound by a decision of the Supreme Court of New Jersey which was issued five days after the sentencing of Carlo Maramonte. In that case of *State v. Des Marets*, 92 N.J. 62, 455 A.2d 1074 (1983) the New Jersey Supreme Court held that N.J.S.A. 2C:43-6c required a mandatory jail sentence when a defendant possessed a firearm during the commission of certain enumerated crimes. At the time of Carlo Maramonte's original sentencing, the law of New Jersey as interpreted by an appellate court was that a mandatory sentence was not required where a defendant possessed a gun but neither used it during the commission of the offense nor possessed it for the purpose of the commission of the offense. *State v. Stewart*, 186 N.J. Super. 517, 525, 453 A.2d 246 (App. Div. 1982), *cert. granted*, 93 N.J. 271, 460 A.2d 674 (1983). The Appellate Division of the Superior Court of New Jersey on November 22, 1983 affirmed this resentence. On January 17, 1984 the Supreme Court of New Jersey without opinion denied Carlo Maramonte's petition for certification.

REASONS FOR GRANTING THE WRIT

I.

The resentencing of the defendant to a more severe sentence because the State Supreme Court in a decision subsequent to the original sentencing had expanded the scope of a mandatory sentencing statute violated the Double Jeopardy Clause of the United States Constitution.

The Fifth Amendment of the United States Constitution prohibits the placing of an individual in jeopardy on more than one occasion. This Clause has two principal purposes. The first is to protect an individual from being subjected to the hazards of a trial and possible conviction more than once for an alleged offense *Green v. United States*, 355 U.S. 184, 187 (1957) and the

second is to prevent imposition of multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

An unconstitutional punishment may stem from the imposition of more than one sentence following a single sentence. *Ex Parte Lange,* 85 U.S. 163, 173 (1874); *In re Bradley,* 318 U.S. 50 (1943). It is principles of fairness and finality which require that a convicted person not be subjected to the possibility of further punishment by being sentenced again for the same offense. *Ex Parte Lange, supra; United States v. Wilson,* 420 U.S. 332, 343 (1975).

On January 21, 1983, the date that the court imposed sentence on Carlo Maramonte, the law of New Jersey as interpreted by the Appellate Division was that N.J.S.A. 2C:43-6c did not apply to a defendant who merely possessed a firearm but did not use it or possess it for the purpose of use during the commission of certain enumerated crimes. *State v. Stewart, supra.* At the time that Carlo Maramonte pleaded guilty, it was stipulated that the firearm was not used during the commission of the burglary.

Subsequent to the court imposing sentence on Carlo Maramonte, the Supreme Court announced its decision in *State v. Des Marets, supra,* which in effect overruled *State v. Stewart, supra,* or limited its holding to the particular facts of that case. The State then moved for the resentencing of Carlo Maramonte. Judge McKenzie, the sentencing judge, retroactively applying *State v. Des Marets, supra,* vacated the sentence previously imposed and sentenced the defendant to a three year prison term with a three-year parole disqualifier.

It cannot be disputed that the defendant Carlo Maramonte has received two punishments for the same offense. Initially the court imposed a term of probation. Twenty days later, the court vacated the prior sentence and imposed a three-year prison term

with a three-year parole disqualifier. The sentencing court stated that the change was mandated by *State v. Des Marets, supra.*

Trial courts in a motion for a change of sentence can only impose a lesser sentence and not an increased sentence. *United States v. Benz,* 282 U.S. 304, 307 (1931). The State in the present case contended that the original sentence was illegal in light of the fact that the law had changed. From the standpoint of the individual who is being prosecuted, if added punishment is what is feared, it hurts no less because the law has changed and what was permitted on Friday is now prohibited on Tuesday. The court justified the change on the theory that his prior sentence was "now" illegal and therefore double jeopardy principles did not prevent the imposition of a new sentence. There are cases which hold that a court can correct an illegal sentence at any time and such a correction is not prohibited by double jeopardy. *See Bozza v. United States,* 330 U.S. 160 (1974). That case is distinguishable from the present case. In the present case the initial sentence which was imposed was not illegal. The sentence was legal when imposed. The Court when it sentenced Carlo Maramonte relied on *State v. Stewart, supra,* which held that N.J.S.A. 2C:43-6c did not apply to a defendant who did not use the firearm during the commission of the crime and did not possess it with a purpose to use it during the commission of the crime. In *Bozza v. United States, supra,* the trial court, in imposing the illegal sentence, made an inadvertent mistake. In contrast, the trial court in this case followed the dictates of the Appellate Court in *State v. Stewart, supra.*

II.

Once a defendant has complied with a portion of his sentence the Double Jeopardy Clause of the United States Constitution prohibits him from being sentenced to a more severe sentence.

Once a defendant has complied with a portion of a sentence, double jeopardy prevents a court from enhancing the punishment. In the case of *In re Bradley*, 318 U.S. 50 (1943) the payment of a fine was a completion of a portion of the sentence and double jeopardy prevented the court from changing the sentence.

In the present case, prior to the vacating of the sentence originally imposed, the defendant reported to probation and paid the seventy-five dollars in penalties which had been imposed. The payment of these penalties and the acceptance of this payment was a compliance with a portion of the sentence and therefore prevented the increased penalty. The State sought and obtained a ten-day stay of the sentence. This ten-day period coincided with the ten-day period which the State is granted the right to appeal from a probationary sentence for a first or second degree crime. N.J.S.A. 2C:44-1f(2). This stay expired without the State having filed a notice of appeal. Once the ten days passed, the State could no longer appeal. *United States v. Di Francesco*, 449 U.S. 117 (1980) is distinguishable from this case because in that case a timely appeal was filed. Once the ten-day period to appeal expired, Carlo Maramonte had a rightful expectation of finality.

In the present case, the State seeks to extend the period in which it can change the sentence by means of an ex parte order it obtained. This ex parte extension was done without notice to the defendant and without any appearance or opportunity to be heard by the defendant. No good cause was ever shown why this motion for an extension should have been granted ex parte. *See* N.J. R.1:6-3. This extension was a nullity. The Prosecutor's office

should not have contacted the Court concerning the stay except upon notice to defense counsel N.J. DR7-110(B)(3). At the time that the sentence was imposed, the State indicated that it intended to file an appeal within ten days of January 21, 1983. The State did not file a notice of appeal until after February 9, 1983. Once the ten-day stay expired, the defendant began serving his probationary term. Jeopardy attached and the sentence could not be changed.

In the present case, jeopardy attached because the defendant paid the seventy-five dollar penalty which the State retained and because the initial ten-day stay which had been properly obtained had expired. *See In re Bradley, supra.*

III.

The resentencing of a defendant to a more severe sentence based on a retroactive application of the law deprived the defendant of due process of law.

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the retroactive enlargement of a criminal statute. *Bouie v. City of Columbia,* 378 U.S. 347, 353 (1964). *See Marks v. United States,* 430 U.S. 188 (1977). This due process bar prevents a court from doing what a legislature is prohibited from doing by the ex post facto clause of the United States Constitution Article 1 §10. While this constitutional prohibition against ex post facto laws does not apply to judicial interpretations of legislation, the policy considerations which support a prohibition against the ex post facto application of a criminal statute are also applicable to judicial decisions which affect the interpretation of a criminal statute. *United States v. Wasserman,* 504 F.2d 1012, 1015 (5th Cir. 1974). *See Bouie v. City of Columbia, supra.* Applications of a law which inflict greater or additional punishment are banned. A change in the

law which alters penal provisions accorded by the grace of the legislature, violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. *Weaver v. Graham,* 450 U.S. 24, 28-29 (1981); *Fletcher v. Peck,* 6 Cranch 87, 148 (1810); *Calder v. Bull,* 3 Dall. 386, 397 (1798). The Supreme Court has noted that an application of a change in the law violated the Constitution when it changed the maximum sentence from discretionary to mandatory. *Lindsey v. State of Washington,* 301 U.S. 397, 401 (1937). In this case, the Court also retroactively applied *Des Marets, supra,* and changed a discretionary prison sentence to a mandatory prison sentence.

If a state legislature is barred by the ex post facto clause from passing a law which retroactively enlarges a criminal statute, a State Supreme Court is barred by the Due Process Clause from achieving the same result by judicial construction. *Bouie v. City of Columbia, supra,* 353-354; *Marks v. United States, supra,* 192.

The constitutional provisions against ex post facto laws not only prohibit the making of an action criminal which was innocent before the enactment of the law but also prohibit the aggravation of a crime. *Bouie v. Columbia, supra.* It is the latter prohibition which has been violated by the retroactive application of *State v. Des Marets, supra.* In *Bouie v. Columbia, supra,* the Court stated:

> Indeed, an unforseeable judicial enlargement of a criminal statute applied retroactively operated precisely like an ex post facto law such as Art. I, §10 of the Constitution forbids . . ." (353).

In *United States v. Hawthorne,* 532 F.2d 318 (3rd Cir. 1976) it was held that due process of law was violated where the Court in a resentencing gave the identical sentence to the first sentence but failed to specify a parole eligibility at any time the Parole

Board specified. Such an eligibility provision had been part of an earlier sentence. The Court held due process was violated because the second sentence was more severe without this provision. In the present case due process of law is violated by the retroactive application of an interpretation of a statute which transformed a discretionary power of imprisonment into a mandatory obligation of imprisonment.

CONCLUSION

For all the above mentioned reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

GERALD D. MILLER

MILLER, HOCHMAN
& MEYERSON
Attorneys for Petitioner

APPENDIX

ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION

SUPREME COURT OF NEW JERSEY
C-396 SEPTEMBER TERM 1983

21,975

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLO MARAMONTE,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2810-82T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 17th day of January, 1984.

s/ Stephen Townsend
Clerk

FILED SUPREME COURT
Jan. 18, 1984

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2810-82T4

Filed Nov. 22, 1983
Elizabeth McLaughlin, Clerk

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CARLO MARAMONTE,

Defendant-Appellant.

Argued November 10, 1983 — Decided November 22, 1983

Before Judges Matthews, J.H. Coleman and Gaulkin

On appeal from the Superior Court, Law Division, Union County.

Gerald D. Miller argued the cause for appellant (Miller, Hochman & Meyerson, attorneys).

Linda J. Wharton, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General, attorney).

Opinion

PER CURIAM

Pursuant to a plea agreement defendant entered pleas of guilty to second-degree burglary (*N.J.S.A.* 2C:18-2), possession of a handgun without a permit (*N.J.S.A.* 2C:39-5(b)) and resisting arrest (*N.J.S.A.* 2C:29-2(a)). The State agreed to dismiss other charges and to recommend that the aggregate custodial sentence not exceed seven years with three years of parole ineligibility.

On January 21, 1983 the trial judge imposed fines and concurrent probationary terms on the burglary and handgun offenses and a fine only for resisting arrest. On the State's application at sentencing, the trial judge stayed execution of sentence for 10 days to permit the State to appeal. See *N.J.S.A.* 2C:44-1(f)(2). On January 31, the trial judge granted the State's *ex parte* application to stay the sentence for an additional 10 days. The State then moved "to correct an illegal sentence," relying on *State v. Des Marets*, 92 *N.J.* 62, decided January 26, 1983. On February 10, 1983, the trial judge vacated the sentences and imposed "new sentences" of three years for burglary with three years of parole ineligibility, three years for the handgun offense and nine months for resisting arrest, all to be served concurrently. Defendant now appeals from the amended judgment of conviction urging:

> POINT I.
>
> The decision of *State v. Des Marets*, 92 *N.J.* 62 (1983), should not be applied retroactively to persons who had been sentenced prior to that decision.

POINT II.

The double jeopardy provisions of the New Jersey and United States Constitutions prohibit the resentencing of the defendant to a more severe sentence.

(b) Once a sentence has gone into operation double jeopardy prevents an increased sentence from being imposed.

POINT III.

The resentencing of the defendant to a more severe sentence and the retroactive application of law deprived Carlo Maramonte of due process of law.

We find these contentions to be clearly without merit. *R.* 2:11-3(e)(2). In *State v. Des Marets*, the Supreme Court did not announce any "new" rule of law but simply determined the meaning and application of *N.J.S.A.* 2C:43-6(c). If, as defendant urges, *Des Marets* "in effect overruled" *State v. Stewart*, 186 *N.J. Super.* 517 (App. Div. 1982), certif. granted 93 *N.J.* 271 (1983), the conclusion to be drawn is not that *Des Marets* is "new" but that *Stewart* was wrong.

The teaching of *Des Marets* is that the probationary sentences initially imposed here were illegal because the court had neither power nor discretion to sentence other than as mandated by *N.J.S.A.* 2C:43-6(c). Principles of double jeopardy did not constitute any barrier to the vacation of the illegal sentence and the imposition of a lawful, albeit more severe, sentence. See *State v. Sheppard*, 125 *N.J. Super.* 332 (App. Div.), certif. den. 64 *N.J.* 318 (1973).

Opinion

Nor is application of *N.J.S.A.* 2C:43-6(c) as construed by *Des Marets* barred by due process principles. *Des Marets* did not retroactively enlarge the scope of *N.J.S.A.* 2C:43-6(c) but rather defined the scope it had upon enactment. *Cf. Bouie v. City of Columbia*, 378 *U.S.* 347 (1964).

The original sentence had not gone into effect before it was vacated. Whether or not notice and an opportunity to be heard should have been given to defendant before the initial stay was extended, the sentence was in fact stayed at all times between its imposition and its vacation. Moreover an illegal sentence is subject to correction even if it has been partially served. See *State v. Sheppard, supra.*

The judgment of conviction is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Elizabeth McLaughlin
Clerk

OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — UNION COUNTY
CRIMINAL

INDICTMENT 34-82

THE STATE OF NEW JERSEY,

V.

ONIFFREDO VENTRICELLI, CARLO MARAMONTE and VINCENT DELEO

DEFENDANTS.

Decided: May 1, 1983

Mr. Mark Cheser, Esq. of the Union County Prosecutor's Office argued for the State of New Jersey

Mr. Samuel DeLuca, Esq. by George Taite, Esq. attorney for defendant, Maramonte

Mr. John P. Russell, Esq. attorney for defendant DeLeo

Mr. Gerald Miller, Esq. attorney for defendant Ventricelli

MCKENZIE, J.S.C.

Opinion

This opinion is an extension of an oral opinion previously rendered on motion by the State to correct an illegal sentence pursuant to R. 3:22-12. The issues raised involve the applicability of the Graves Act to the factual pattern presented.

The three defendants entered retraxit pleas of guilty to certain counts of the indictment as a result of a plea bargain. Defendant Carlo Maramonte pled guilty to burglary in violation of *N.J.S.A.* 2C:18-2; unlawful possession of a firearm in violation of *N.J.S.A.* 2C:39-5; and resisting arrest in violation of *N.J.S.A.* 2C:29-2(a). Defendant Vincent DeLeo pled guilty to burglary, *N.J.S.A.* 2C:18-2; unlawful possession of a knife in violation of *N.J.S.A.* 2C:39-5(d); and to resisting arrest in violation of *N.J.S.A.* 2C:29-2(a). Defendant Onnifreddo Ventricelli pled guilty to burglary in violation of *N.J.S.A.* 2C:18-2 and to theft in violation of *N.J.S.A.* 2C:20-3.

The factual basis given for the pleas is that on July 11, 1982 the defendants were taken to a railroad yard in the port section of Elizabeth by a fourth party who agreed to return an hour later to pick them up. They walked into the yard at 12:30 a.m. and broke into a container trailer. Maramonte had a gun in his back pocket which he threw over the fence when the trio were surprised by the police as they started to move the merchandise from the trailer. DeLeo was found to have a knife in his possession. Neither weapon was used in the commission of the burglary and theft. DeLeo did not know that Maramonte had a gun until he saw Maramonte throw it away. Ventricelli knew of the existence of the gun before the burglary but did not know that Maramonte had taken the gun along during the actual commission of the burglary and theft.

Opinion

When the defendants first appeared for sentencing, this court ruled that *N.J.S.A.* 2C:43-6c[1] (hereinafter referred to as the Graves Act) did not apply to these defendants. It based its decision on the Appellate Division decision in *State v. Stewart*, 186 *N.J. Super.* 517 (App. Div. 1982) (certif. pending). *Stewart* held the Graves Act inapplicable to a defendant in possession of a firearm during the commission of a crime who does not intend to use it in committing it. Noting the defendants' otherwise unblemished records, the court imposed sentences of probationary terms and fines.

Thereafter the Supreme Court announced its decision in *State v. Des Marets*, 92 *N.J.* 62 (1983). The Court held, *inter alia* that if a defendant is in possession of a firearm during the commission of a crime enumerated in the Graves Act, intent to use the firearm is not required to bring the Act into operation. The Court thereby overruled *State v. Stewart, supra,* as applied by this court in sentencing these defendants.[2] Thereupon the State filed a motion to correct an illegal sentence pursuant to R. 3:22-12 which reads in part:

---

1. A person who has been convicted under 2C:39-4a of possession of a firearm with intent to use it against the person of another, or of a crime under any of the following sections: 2C:11-3, 2C:11-4, 2C:12-1b, 2C:13-1, 2C:14-2a; 2C:14-3a, 2C:15-1, 2C:18-2, 2C:29-5, who, ***while in the course of committing or attempting to commit the crime***, including the immediate flight therefrom, used or was in possession of a firearm as defined in 2C:39-1f, shall be sentenced to a term of imprisonment by the court. The term or imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at or between, one-third and one-half of the sentence imposed by the court or 3 years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole. (Emphasis supplied.)

2. *Stewart* may still have some validity as applied to the specific facts of the case. In Note 5 of its opinion in *Des Marets*, the Supreme Court alludes (Cont'd)

"A petition to correct an illegal sentence may be filed at any time. . . ."

Defendants argue that R. 3:22-1 is a remedy for an aggrieved defendant and not for the State. They also argue any increase in their sentences would violate their constitutional right against double jeopardy.

An illegal sentence is inoperative and subject to correction at any time; *State v. Shepard*, 125 *N.J. Super.* 334, 336 (App. Div. 1963); *State v. Fisher*, 115 *N.J. Super.* 379 (App. Div. 1971). Such a correction, even if it results in a more severe sentence, does not constitute to double jeopardy. *Bozza v. United States*, 330 *U.S.* 160, 67 *S. Ct.* 645, 91 *L. Ed.* 918 (1947); *State v. Greene*, 33 *N.J. Super.* 497 (App. Div. 1955). The court's jurisdiction to impose a correct sentence does not expire until a valid sentence is imposed. *State v. Culver*, 23 *N.J.* 495, 511 *Cert. den.* 354 *U.S.* 925, 77 *S. Ct.* 1387, 1 *L. Ed.* 2d 1441 (1957). R. 3:22-12 does not provide otherwise.

Therefore the legality of the sentence given to each defendant must be examined in light of *State v. Des Marets*, 92 *N.J.* 62 (1983). It is obvious that the Graves Act applies to defendant Maramonte. For purpose of the applicability of the Graves Act, it is irrelevant that Maramonte did not use or did not intend to use the gun during the commission of the burglary in question. Id. at 10. The non-custodial sentence previously imposed on

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(Cont'd)

to *Stewart* by saying: "But see *State v. Stewart*, 186 *N.J. Super.* 517 (1982), (certif. pending) in which the Appellate Division held that the presence of a flaregun in the interior of a vehicle did not constitute possession as defined by the Graves Act."

Maramonte is vacated, and he is sentenced to serve the three year minimum sentence mandated by the Act.

A more difficult question is whether the Graves Act applies to Maramonte's accomplices, defendants Ventricelli and DeLeo. The State contends that if Maramonte is subject to application of the Graves Act, the Act must also apply to the other defendant through accomplice liability pursuant to *N.J.S.A.* 2C:2-6.

While *Des Marets* establishes that purpose to use the firearm need not be established for the Graves Act to apply, *N.J.S.A.* 2C:2-2(a), a statute of general application, requires that some culpable state of mind, either purposely, knowingly, recklessly or negligently, be established in order that conduct be unlawful. Furthermore, although a definition of "possession" is not found in the Graves Act, it is defined in *N.J.S.A.* 2C:2-1(c), another statute of general application, as: "an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."

The Supreme Court noted this definition in its discussion of the applicability of the Graves Act in *Des Marets*, 92 *N.J.* at 68, footnote 6, and it is in accord with previous holdings under Title 2A that an unlawful possession must be a knowing possession. See *e.g. State v. Brown*, 80 *N.J.* 587, 597 (1979); *State v. Reed*, 34 *N.J.* 554, 557 (1961).

On the factual basis here, neither Ventricelli nor DeLeo had knowledge that Maramonte was carrying a gun when they committed the burglary and theft.

Opinion

DeLeo and Ventricelli were at least accomplices of Maramonte in the burglary and are therefore liable as principal. *State v. Cooper*, 10 *N.J.* 532, 568 (1952); *State v. Alexander*, 184 *N.J. Super.* 615, 621 (Law Div. 1982). In order to be guilty as an accomplice, however, one must have the same intent as the principal. *State v. Madden*, 61 *N.J.* 377, 396-7 (1972); *State v. Newell*, 152 *N.J. Super.* 460, 469 (App. Div. 1977). Without knowledge that Maramonte possessed a gun at the time of the crime, DeLeo and Ventricelli obviously did not have the culpable state of mind to be in unlawful possession of the handgun while the burglary was being committed. So while they were accomplices of Maramonte for purposes of the burglary itself, they were not accomplices in his possession of the weapon. It follows that defendants DeLeo and Ventricelli are not subject to the mandatory provisions of the Graves Act.

In support of its position that the Graves Act applies to DeLeo and Ventricelli, the State cites the cases of *State v. Gantt*, 186 *N.J. Super.* 262 (Law Div. 1982) and *State v. Alexander*, 184 *N.J. Super.* 615 (Law Div. 1981) wherein the respective courts applied the Graves Act to accomplices. These cases are inapposite however, because in neither of these cases was it established that the accomplices were unaware that principal was in possession of a firearm as in the case at bar.

There is nothing in this decision which is inconsistent with the intent of the Legislature in enacting the Graves Bill. The focus of the Act is deterrence. *State v. Des Marets, id.* at 93; *New Jersey Assembly Judiciary Committee,* statement to Senate No. 1071, July 24, 1980. Since DeLeo and Ventricelli had no knowledge of the presence of the handgun at the scene of the burglary, application of the Graves Act to them and others in similar circumstances would serve no deterrent purpose. One cannot be

deterred from doing something which he does not know he is doing. Therefore, this court is satisfied that the Legislature did not intend that the Graves Act apply to persons committing crimes with no knowledge that a codefendant had a handgun on his person at the time of the offense.

This court concludes therefore that while *Des Marets* compels it to grant the State's motion to correct the sentence of Maramonte, the sentences of DeLeo and Ventricelli may stand. The motion to correct those sentences is therefore denied.

END OF DOCKET